

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HEIDI BETZ,

No. C 03-03231 SI

Plaintiff,

**ORDER GRANTING LEAVE TO FILE  
SUR-REPLY AND ORDERING  
SUPPLEMENTAL BRIEFING**

v.

TRAINER WORTHAM & CO. et al.,

Defendants.

Currently before the Court is defendants' motion for partial summary judgment on plaintiff's Section 10(b) Securities Act claim and Business & Profession Code Section 17200 claim. With respect to plaintiff's Section 10(b) claim, defendants argue for the first time in the eight year history of the case that the claim is barred by the three year statute of repose that was in effect prior to the enactment of the Sarbanes-Oxley Act in July 2002. Defendants note that courts in the Northern District have held that the statute of repose, which is not subject to equitable tolling, begins to run on the date of the first misrepresentation. *See, e.g., In re Brocade Communs. Sys. Derivative Litig.*, 615 F. Supp. 2d 1018, 1035 (Breyer, J.) (N.D. Cal. 2009); *In re Juniper Networks, Inc. Secs. Litig.*, 542 F. Supp. 2d 1037, 1051 (Ware, J.) (N.D. Cal. 2008); *In re Maxim Integrated Prods.*, 574 F. Supp. 2d 1046, 1071 (Ware, J.) (N.D. Cal. 2008). Those Courts have likewise held that each false representation may constitute a separate violation of Section 10(b), but a plaintiff "may not recover for reliance on representations made prior to the [ ] statute of limitations period under a theory of continuing wrong." *In re Juniper Networks, Inc. Secs. Litig.*, 542 F. Supp. 2d at 1051.

In response to defendants' argument, which was fleshed out and supported with case law only in their Reply brief, plaintiff filed a motion for leave to file a Sur-Reply brief in opposition. [Docket No.

1 109]. Defendants respond that Sur-Reply is procedurally improper and substantively misguided.  
2 [Docket No. 110]. The Court, however, GRANTS plaintiff's motion for leave to file the Sur-Reply..

3 In her Sur-Reply, plaintiff argues that this Court should not follow the Northern District Judges  
4 who have decided the issue, and instead follow district courts from the First and Second Circuits who  
5 have held that the repose period runs from the date of the *last* alleged representation regarding the same  
6 subject matter. *See* Sur-Reply (Docket No. 109-1) at 1-2. Nevertheless, plaintiff indicates that if this  
7 Court chooses to follow the decisions from this District, plaintiff still has "a §10(b) claim for unsuitable  
8 investments and misrepresentations" made after July 31, 1999, *i.e.*, three years prior to the date  
9 Sarbanes-Oxley was enacted. *Id.* at 2.

10 Defendants' response to the Sur-Reply argues that the Second Amended Complaint does not  
11 support plaintiff's new assertion that actionable post-July 1999 representations were made or that  
12 plaintiff can rest her 10(b) claim on the unsuitable investments allegations where the investment plan  
13 was made and executed prior to July 31, 1999. *See* Docket 110 at 2-3.

14 Having reviewed the cases, the Court is inclined to follow the case law from this District and  
15 find that plaintiff cannot rely on any representations that occurred prior to July 31, 1999 to support her  
16 Section 10(b) claim.<sup>1</sup> The Court is concerned, however, whether there are adequate allegations in the  
17 operative Second Amended Complaint to support plaintiff's position that her Section 10(b) claim can  
18 survive based on allegations of unsuitable investments and unspecified "misrepresentations" that  
19 occurred after July 31, 1999.

20 For the foregoing reasons, on or before **Tuesday April 17, 2011**, plaintiff must submit a  
21 supplemental brief, not to exceed five (5) pages, specifically identifying the misrepresentations made  
22 after July 31, 1999 that she claims are still actionable and where those allegations can be found in the  
23 operative complaint, as well as the basis for her assertion that the unsuitable investments claim can  
24 survive despite the fact that the unsuitable investments were initially made on June 10, 1999.

25 Defendants will be provided an opportunity to respond to plaintiff's supplemental briefing at the  
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27 <sup>1</sup> The Court is not inclined, however, to find that plaintiff's claim is barred by either the former  
28 one year or current two year statute of limitations that runs from the "discovery" of the violation. *See*  
28 U.S.C. § 1658(b).

1 April 22, 2011 hearing on their motion.

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3 **IT IS SO ORDERED.**

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5 Dated: April 15, 2011

  
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SUSAN ILLSTON  
United States District Judge